IN THE

Supreme Court of the United States

OCTOBER TERM—1938

No. 269

INTERSTATE CIRCUIT, INC., *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

No. 270

PARAMOUNT PICTURES DISTRIBUTING COMPANY, INC., *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANTS.

GEORGE S. WRIGHT,
Solicitor for All Appellants.

THOMAS D. THACHER,
Solicitor for Distributor Defendants-Appellants.

JOHN R. MORONEY,
RICHARD H. DEMUTH,
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BRIEF OF APPELLANTS.

Opinion Below.

The opinion of the court below (R. I, 229)* is reported in 20 F. Supp. 868. The opinion of this Court upon a former appeal remanding the case with directions to the District Court to state its findings of fact and conclusions of law is reported in 304 U. S. 55.

* The record now before the Court is in two parts. The first part, which is the record which was before the Court upon a former appeal, is designated as "R. I"; the second part, which contains the proceedings after the first appeal, is designated as "R. II".

Jurisdiction.

The Statement filed under Rule 12 shows that this suit was brought by the United States under the Sherman Anti-Trust Act, which provides for direct appeal to this Court from the final decree of the District Court. 32 Stat. 823, 36 Stat. 1167, 15 U. S. C. A. § 29. Probable jurisdiction of this appeal was noted by this Court on October 10, 1938.

Statutes Involved.

Section 1 of the Sherman Anti-Trust Act, approved July 2, 1890, 26 Stat. 209, 15 U. S. C. A. § 1, as amended August 17, 1937, 50 Stat. 693, and Section 1(a) and (d) of the Copyright Act, approved March 4, 1909, 35 Stat. 1075, 17 U. S. C. A. § 1, are set forth in the appendix, pages 70-71, *infra*.

Definitions of Terms Used.

A feature picture is a film of five reels or more and a reel is approximately 1,000 feet in length.

First run means the first exhibition of a picture in a given locality and subsequent run means a subsequent exhibition of the same picture in the same locality.

A Class A picture is a feature picture which is shown in the cities of Dallas, Fort Worth, Houston or San Antonio first run at a lower floor night adult admission price of 40¢ or more.

Double featuring or double billing is the showing of two feature pictures on the same program at the same admission price.

Admission price, unless the context otherwise indicates, means night lower floor adult admission price.

Questions Presented.

This case involves the validity under the Sherman Anti-Trust Act of agreements made by individual distributors of copyrighted motion picture photoplays with a first run exhibitor to insert in license agreements with subsequent run exhibitors a provision that any feature picture shown first run by the first run exhibitor at an admission price of 40¢ or more should not thereafter be shown subsequent run in the same city at an admission price of less than 25¢ or as part of a double feature program.

The questions presented are:

(1) Whether the inclusion by a distributor, acting independently of any other distributor, of either or both of such restrictions in its subsequent run licenses, pursuant to agreement with its first run licensee, is within the protection of the Copyright Act or is in violation of the Sherman Act.

(2) Whether the inference by the court below of conspiracy among the distributor defendants may legally be inferred from the findings of fact upon which it is expressly predicated when such findings are read in the light of facts established by the agreement and stipulation of the parties and by the undisputed evidence.

(3) If such inference is supportable, whether the decree must nevertheless be reversed because of the restraint it permanently imposes upon individual action in the absence of conspiracy or agreement among competing distributors.

(4) Whether the restrictions unreasonably restrain interstate trade or commerce within the provisions of the Sherman Anti-Trust Act.

Statement.

This action was commenced by the Government in the United States District Court for the Northern District of Texas, Dallas Division, to enjoin alleged violation by the defendants of the Sherman Anti-Trust Act. The principal defendants are Interstate Circuit, Inc., a first and subsequent run exhibitor in six Texas cities, and Texas Consolidated Theatres, Inc., a first and subsequent run exhibitor in other cities in Texas and New Mexico, and eight motion picture distributing companies (hereinafter sometimes referred to as "distributor defendants").* Karl Hoblitzelle and R. J. O'Donnell, President and General Manager respectively of both Interstate Circuit and Texas Consolidated Theatres, are also defendants to the bill.

The amended petition charged all of the defendants with having engaged in a combination, conspiracy and agreement to restrain trade and commerce in motion picture films and to monopolize or attempt to monopolize the exhibition of such films in Texas and New Mexico in violation of the Sherman Anti-Trust Act (R. I, 6). The

* The eight distributor defendants are: Paramount Pictures Distributing Company, Inc. (herein called "Paramount"), Vitagraph, Inc. (herein called "Vitagraph"), R. K. O.-Radio Pictures, Inc. (herein called "RKO"), Columbia Pictures Corporation (herein called "Columbia"), United Artists Corporation (herein called "United Artists"), Universal Film Exchange, Inc. (herein called "Universal"), Metro-Goldwyn-Mayer Distributing Corporation (herein called "Metro"), and Twentieth Century-Fox Film Corporation (herein called "Twentieth Century"). Metro-Goldwyn-Mayer Distributing Corporation of Texas, a subsidiary of and the Texas agent for Metro, and Twentieth Century-Fox Film Corporation of Texas, a subsidiary of and the Texas agent for Twentieth Century, are also named as defendants.

alleged combination, conspiracy or agreement is defined in paragraphs 25, 26 and 27 of the petition (R. I, 6-7), the allegations of which may be summarized as follows:

> (1) that the exhibitor defendants, in order to strengthen their monopoly in first run exhibition of feature films and to further their attempts to monopolize the subsequent run exhibition of feature films in certain cities in Texas formed a plan or conspiracy to induce the distributor defendants to include a 25¢ admission price and a double feature restriction in subsequent run license agreements, and in furtherance of such plan or conspiracy, advised the respective representatives of the distributor defendants that unless they would insert such restrictions in subsequent run licenses, they, the exhibitor defendants, would no longer attempt to maintain a night adult admission price of 40¢ or more for first run exhibition of each feature film thereafter licensed from the distributors; and
>
> (2) that upon receipt of said advices from the exhibitor defendants the distributor defendants agreed to join in the plan or conspiracy and to impose the restrictions, and did impose them upon subsequent run exhibitors of their feature pictures in furtherance of the plan or conspiracy.

There are no allegations that the distributor defendants agreed or conspired among themselves to enter into agreements with the exhibitor defendants or to impose the restrictions upon subsequent run licensees.

As we shall show, the court below departed from the Government's theory of action and predicated decision primarily upon a finding that "the distributor defendants agreed and conspired among themselves to take uniform action upon the proposal made by Interstate". Finding No. 22, R. II, 56.

The answer of each defendant denied under oath that it had joined in any combination, conspiracy or agreement in restraint of trade or to monopolize trade or commerce.

Each contends that the license agreements made by the distributor defendants with Interstate Circuit were made without any agreement or conspiracy among the distributor defendants as to the action which they would individually take upon the proposal made by Interstate, and that the provisions of these agreements with respect to admission prices and double features were in all respects valid agreements under the copyright laws of the United States and were not in violation of the Sherman Anti-Trust Act.

The case was tried on an agreed statement of facts and oral testimony. By stipulation, evidence at the trial was limited to proof not inconsistent with any fact contained in the agreed statement of facts (R. I, 48). Accordingly, the facts stipulated are to be taken as established.*

After trial, the District Court entered a decree granting the plaintiff injunctive relief (R. I, 242-246). The decision was accompanied by a written opinion (R. I, 229) which expressed the view of the District Court that it was a violation of the Sherman Anti-Trust Act for any distributor, acting independently, to agree with Interstate Circuit to impose the restrictions.

On appeal to this Court, the decree was set aside because of the failure of the District Court to make findings of fact and conclusions of law in conformity with Equity Rule 70½, and the cause was remanded with directions to the court below to state its findings and conclusions (304 U. S. 55).

The court below has now made special findings of fact and has inferred that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate to impose the restrictions and that they agreed and conspired with Interstate to impose them. The court concluded as a matter of law that the restrictions imposed upon subsequent run licensees pursuant to the conspiracy effected an unreason-

* Throughout this brief a reference to the agreed statement of facts will be indicated by the letters A. S.

able restraint of interstate commerce, and that even apart from any conspiracy or agreement among the distributor defendants, it was a violation of the Sherman Act for any distributor, acting independently, to impose either or both of the restrictions pursuant to individual agreement between it and Interstate Circuit (R. II, 50-62). The court did not find that the exhibitor defendants, in requesting the restrictions, had the illegal purpose of attempting to monopolize or to strengthen a monopoly, or that any agreement made by any of the distributor defendants was part of a plan or conspiracy to monopolize or to strengthen a monopoly.

A decree was entered which not only enjoined performance of all agreements which had been made but went so far as to enjoin each and every distributor defendant, whether acting singly or in concert with others, from hereafter agreeing with Interstate Circuit as part of the terms of a first run license agreement that such distributor would impose upon subsequent run licensees any restrictive price or double feature provisions whatever. The same injunction ran against license agreements with Texas Consolidated, although but one of the distributors had agreed with this exhibitor to impose any restrictions upon subsequent run licensees and the court had not found any conspiracy among any of the distributor defendants to impose any restrictions requested by Texas Consolidated (R. II, 77-79).

In 1934, Interstate Circuit acquired in receivership proceedings in the Federal Court all of the exclusively first run theatres in Dallas, San Antonio, Fort Worth, Austin and Galveston and all of the exclusively first run theatres in Houston, except one, and also a number of subsequent run theatres in these cities (A. S. par. 20, R. I, 79-80).

Among the theatres thus acquired by Interstate Circuit are the finest theatres in the state, with the most modern

and efficient equipment and every convenience, including the best sound equipment which can be bought, fire comfortable seats and air-conditioning (R. I, 183, 184). Their individual seating capacity far exceeds that of any other theatres in the state (*id.*). Their lower floor night adult admission prices range from 40¢ to 50¢ (A. S. par. 7, R. I, 53-58). These theatres are referred to in the testimony as Class A theatres. Interstate Circuit also acquired in the receivership proceedings several other less elaborate and smaller first run theatres, admission to which costs 25¢ to 35¢ (*id.*).

With the single exception of one theatre in Houston there were not then, and there are not now, any other theatres in any of the cities in which Interstate Circuit operates of sufficient capacity and equipment to show Class A pictures first run downtown and in any manner to approach the film rental paid by the Interstate Class A houses, because the competing theatres are small, old-fashioned and of an obsolete type (R. I, 184).

In addition to its first run business, Interstate Circuit owns 22 subsequent run theatres in the six cities in which it operates. There are 53 competing subsequent run theatres in these six cities (A. S. pars. 7, 20, R. I, 53-58, 80).* There are approximately 921 motion picture theatres in the State of Texas, of which Interstate Circuit operates approximately 60 (R. I. 53-58, 226).

* In Dallas, Interstate operates 6 subsequent run theatres and there are 21 competing theatres. In Houston, Interstate operates 5 subsequent run theatres and there are 10 competing theatres. In San Antonio, Interstate operates 5 subsequent run theatres and there are 8 competing theatres. In Fort Worth, Interstate operates 3 subsequent run theatres and there are 11 competing theatres. In Galveston, Interstate operates 1 subsequent run theatre, and there are no theatres operated by others except a theatre for Negroes. In Austin, Interstate operates 2 subsequent run theatres and there are 3 competing theatres (A. S. par. 7. R. I, 53-58).

Because of its ownership and operation of these theatres, Interstate Circuit was by far the largest and most valuable customer of each of the distributor defendants in each of the six cities where it operated. License fees for first run exhibition of feature pictures received from Interstate Circuit, which are generally based upon a percentage of the gross receipts, aggregated between 70% and 75% of the total license fees for such pictures received by the distributor defendants from all exhibitors in these cities (A. S. par. 4, R. I, 52).* This was primarily due to the fact that the average film rental of Interstate Circuit for first run exhibition in its Class A theatres was from $1,500 to $5,000 per picture and in its other first run theatres from $150 to $500 per picture, whereas the average subsequent run rental in the same location for the same pictures was from $20 to $30 per picture (A. S. par. 4, R. I, 52, 179).** Furthermore, the rentals paid by Interstate for subsequent run exhibition of Class A pictures were greater by four or five times per picture than the rentals paid by the other subsequent run exhibitors, Interstate paying from $100 to $150 per picture whereas, as above stated, the average subsequent run rental was from $20 to $30 (*id.;* R. I, 197).

The success of Interstate Circuit and of each of the distributor defendants necessarily depends upon successful first run exhibition. The success of first run exhibition in turn depends not merely upon the quality

* In those few cases where the agreement between Interstate Circuit and a particular distributor was on a flat rental basis, the license fee was arrived at by approximation of what the gross receipts would be based upon past experience on pictures of the same type and agreement upon a flat fee measured by a percentage of the estimated receipts (R. I, 168).

** Expressed in terms of total license fees, Interstate Circuit paid $944,452.85 to the distributor defendants for first runs during the 1934-1935 season and $133,366.73 for subsequent runs, whereas the total amount of license fees paid by all other exhibitors in the six cities involved was $369,594.72 (A. S. pars. 5, 6, R. I, 52-53).

of the picture shown but upon the attractiveness, comfort and seating capacity of the theatre in which it is exhibited. The finer theatres must obviously demand higher admission prices to meet higher costs of investment and operation. Consequently their success necessarily depends upon some protection against the competition of cheap subsequent run exhibition in theatres where the same costly pictures shown in the first run house are shown with frequent changes during the week and two features on the same bill for a single admission of one-third the price charged by the first run house. This is particularly true when the first run theatres not only pay fifty times the rental on each picture but show it on a single bill for a whole week and spend approximately $1,000 a week on advertising which redounds to the benefit of the subsequent run exhibitors, who have practically no advertising costs (R. I, 162-163).

Not only did Interstate Circuit, as first run exhibitor, have to pay higher license fees and advertise at great expense, but it was also required by the distributors to exhibit certain of their pictures in its Class A theatres and to charge therefor a minimum 40¢ admission price or account for the difference (R. I, 168).* While for years prior to 1934 there had also been admission price restrictions in subsequent run license agreements, the usual minimum price required to be charged at that time was only 15¢ (R. I, 193). Moreover, while Interstate Circuit, paying license fees of from $1,500 to $5,000 per picture, could afford to play only one Class A picture for its 40¢ or 50¢ admission price, subsequent run exhibitors, paying license fees of $20 or $30 for precisely the same picture, were able to show it in conjunction with another feature picture for an admission price of 15¢.

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* Hoblitzelle stated, in explaining the reasons for Interstate's request for restrictions (R. I, 168): "My position is that if I have to charge forty cents and pay the rental I cannot let them be shown subsequently for less than twenty-five cents, without hurting my business."

By the Spring of 1934, as stated by the trial court, cheap subsequent run admission prices and double featuring of Class A pictures were destroying Interstate Circuit's first run earning capacity (R. I, 236, 161-165). Pictures exhibited first run at an admission price of 40¢ or more were being exhibited a short time thereafter at a 10¢ or 15¢ admission price (R. I, 177-178). There was, moreover, a tremendous increase in the cost of operating its theatres (R. I, 167, 176). At the same time it was being met with demands for increased rentals from the distributors because of their greatly increasing costs of production (R. I, 161). Pictures that had cost $600,000 were then costing $1,000,000 or more (R. I, 176) and the cost of feature pictures distributed by the distributor defendants ranged from $150,000 to $2,500,000 (A. S. par. 16, R. I, 79).

Confronted by this situation, it was imperative for Interstate to take action to protect its business. Without any prior communication with any distributor defendant, O'Donnell on April 25, 1934, wrote each distributor defendant as follows (A. S. par. 10, R. I, 62-63):*

"INTERSTATE CIRCUIT, INC.,
Majestic Theatre Building,
Dallas, Texas

APRIL 25, 1934.

GENTLEMEN:

As the present season is drawing to a close, we want to go on record with your organization in notifying

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* Prior to the writing of the letter of April 25, 1934 Interstate Circuit consulted its attorney and was advised that under the copyright law it, as licensee of a copyrighted motion picture photoplay, would have the right to contract with the licensor for the exclusive right to show the photoplay and had the lesser right to contract with such licensor that the photoplay shown by Interstate Circuit at a stipulated admission price should not be subsequently shown at a price less than that agreed upon between Interstate Circuit and such licensor (R. I, 163).

you that we would like to discuss the purchase of subsequent runs in Dallas, Fort Worth, Houston, San Antonio, Austin and Galveston, for your product.

We also want to go on record that we will expect certain clearance next season as regards our first run programs which are presented at a minimum price of 40¢ or more. In these situations, we are going to insist that subsequent run prices be held to a minimum scale of 25¢.

As an example, we feel that if we are to continue to pay outstanding first run film rentals for 'A' houses such as the Palace Theatre, Dallas, these same pictures must not be exhibited in the subsequent runs at less than 25¢ at any future time. We also want you to bear in mind that we are operating second and subsequent run theatres in most of these towns and it is quite possible that we will have additional subsequent run theatres.

The writer would like to discuss this with you as soon as possible."

On July 11, 1934, O'Donnell addressed the following letter to each of the following representatives of each of the distributor defendants (A. S. par. 11, R. I, 63-64):

"INTERSTATE CIRCUIT, INC.,
Majestic Theatre Building,
Dallas, Texas

JULY 11, 1934.

MESSRS. J. B. DUGGER	LEROY BICKEL
HERBERT MACINTYRE	J. B. UNDERWOOD
SOL SACHS	E. S. OLSMYTH
C. E. HILGERS	DOAK ROBERTS

GENTLEMEN:

On April 25th, the writer notified you that in purchasing product for the coming season 34-35, it

would be necessary for all distributors to take into consideration in the sale of subsequent runs that Interstate Circuit, Inc., will not agree to purchase product to be exhibited in its 'A' theatres at a price of 40¢ or more for night admission, unless distributors agree that in selling their product to subsequent runs, that this 'A' product will never be exhibited at any time or in any theatre at a smaller admission price than 25¢ for adults in the evening.

In addition to this price restriction, we also request that on 'A' pictures which are exhibited at a night admission price of 40¢ or more—they shall never be exhibited in conjunction with another feature picture under the so-called policy of double features.

At this time the writer desires to again remind you of these restrictions due to the fact that there may be some delay in consummating all our feature film deals for the coming season, and it is imperative that in your negotiations that you afford us this clearance.

In the event that a distributor sees fit to sell his product to subsequent runs in violation of this request, it definitely means that we cannot negotiate for his product to be exhibited in our 'A' theatres at top admission prices.

We naturally, in purchasing subsequent runs from the distributors in certain of our cities, must necessarily eliminate double featuring and maintain the maximum 25¢ admission price, which we are willing to do.

Right at this time the writer wishes to call your attention to the Rio Grande Valley situation. We must insist that all pictures exhibited in our 'A' theatres at a maximum night admission price of 35¢ must also be restricted to subsequent runs in the Valley at 25¢. Regardless of the number of days which may intervene, we feel that in exploiting and

selling the distributors' product, that subsequent runs should be restricted to at least a 25¢ admission scale.*

The writer will appreciate your acknowledging your complete understanding of this letter."

The precise nature of Interstate Circuit's proposal should be noted. Its demand was not that all pictures should be limited to a 25¢ subsequent run admission price and to single feature exhibition; it was simply that the more expensive Class A pictures, for which the producers had to receive larger license fees and which were shown first run at a minimum admission price of 40¢, should be protected against cheap subsequent run exhibition in the same city. Mr. Hoblitzelle explained his request as follows (R. I, 163-164):

"In 1934 I thought it necessary for the protection of my business to request these restrictions. In order to meet the demands for the increased rentals, on the part of the distributors, and realizing at the same time, one of the reasons for the decrease in their rentals, was the effect upon the first run exhibition of pictures in big theatres, by the indiscriminate offering to the public good and bad and indifferent pictures, at more or less the same price, that the solution for us was to segregate these pictures, and those pictures of merit, which in the vast majority of cases cost a great deal of money to produce, should be protected first by being put in the best theatres at forty cents or more, and that thereafter should be protected in the subsequent runs for the reason then, and now, that the exhibiting of these same films,

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* This paragraph, requesting a price restriction in the Rio Grande Valley, refers to part of the territory in which Texas Consolidated Theatres operates and in which Interstate Circuit does not operate. No such restriction was ever imposed by any distributor. It was very different from the price restriction proposed by Interstate Circuit. We discuss it at pages 50-54, *infra*.

subsequently at a very reduced admission price, is bound to affect not only the admissions of the first run theatre, but the rentals that that first run theatre can pay the producers. And that without a sufficient revenue * * * we would not have those better class pictures available for the public, and for ourselves. It was on that basis and no other basis, that, other than to protect our first run theatres, this conclusion was reached and that these restrictions were asked."

ınd further (R. I, 167):

"The reason that I requested each distributor to insert a provision against double billing was that I thought it would injure my business in income and in the eyes of the public."

The Class A pictures for which the restrictions were equested constituted approximately 50% of the total umber of feature pictures released by the distributor lefendants in Texas,* and considerably less than 50% f the total number of feature pictures released by all he distributors of motion pictures in Texas (A. S. par. 2, R. I, 50-51). In addition to the Class A pictures, there vere more than enough unrestricted feature pictures roduced each year to fill the programs of all independent exhibitors who might not desire to exhibit the nore expensive product at an admission price commensurate with its cost (A. S. par. 3, R. I, 51, 198). Each

* For the 1934-1935 season, the distributor defendants reeased 348 feature pictures, of which 179 in Dallas, 157 n Fort Worth, 178 in San Antonio and 92 in Houston vere Class A pictures. For the season 1935-1936, the listributor defendants released 364 feature pictures, of which 190 in Dallas, 174 in Fort Worth, 194 in San Antonio and 92 in Houston were Class A pictures (R. I, 51). In addition 119 feature pictures were released by other distributors in 1934, 169 feature pictures in 1935 and 134 in 1936 (R. I, 50).

of the distributors did license such pictures to such exhibitors without restriction (A. S. par. 7, R. I, 55-58).[6]

Interstate Circuit did not "demand" the restriction in the sense of threatening to cease business with any non-complying distributor. Its position, as taken in the foregoing letters and subsequently amplified in the negotiations with each of the distributor defendants, was that unless the particular distributor involved would agree to impose the restrictions, Interstate Circuit could not afford to play the feature pictures of that distributor in its Class A first run theatres, at which admission prices of 40¢ or 50¢ were charged, but would be forced to exhibit such pictures in its lower class first run theatres at which admission prices of 25¢ or 35¢ were charged (R. I, 167).

The proposal thus presented to each distributor the choice of first run exhibition of its best pictures in Class A theatres with the proposed restrictions upon subsequent run exhibition, or of first run exhibition of such pictures in second class theatres without such restrictions upon subsequent run exhibition. Financial considerations constrained the same action by each distributor. The minimum film rental for Interstate's Class A theatres was $1,500 per picture (A. S. par. 4, R. I, 52); the minimum rental for its other first run theatres, in Dallas for instance, was from $150 to $400 per picture (R. I, 179). The minimum first run rental of any distributor unwilling to negotiate upon the terms proposed by Interstate was, therefore, certain to be decreased in Dallas alone by at least $1,100 for every picture which, but for this fact, would have been shown in one of Interstate's Class A theatres (R. I, 167). Similar losses would necessarily occur in the other cities.

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[6] The District Court's conclusion of law No. 5 that the distributor defendants agreed with Interstate Circuit "not to enter into exhibition contracts with, that is, to boycott any [subsequent run] exhibitors unable or unwilling to accept" the restrictions (R. II, 59) is palpably in error.

The price and double feature restrictions were not only advantageous to Interstate Circuit and to each of the distributor defendants, but if rejected by any one of the individual distributors would have been destructive of its business interests. This is shown in the agreed statement of facts as follows (A. S. pars. 18, 19, R. I, 79):

> "18. The exhibition subsequent run of feature motion pictures at a night adult admission price of less than 25¢ which have been exhibited first run at a night adult admission price of 40¢ or more in the same city will reduce the income of the theatre giving such first run exhibition and the total license fees of the distributor of such motion pictures.
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> 19. The exhibition of a feature moving picture of a distributor defendant on the same program and as a part of the program with any other feature moving picture reduces the value of such moving picture and reduces the total license fees of the distributor of such moving picture."

Since the license fees for first run exhibition amounted to between 70% and 75% of the total license fees received per picture, the inevitable loss of first run revenues of any distributor rejecting the proposals could hardly be offset by increased revenues from subsequent run exhibition.

Accession to Interstate Circuit's request was therefore of great advantage to each of the distributor defendants and refusal of the request would have proved disastrous to any non-complying distributor (R. I, 194).

It was not shown that any representative of any distributor defendant had any discussion or communication with any representative of any other distributor defendant regarding the proposals of Interstate Circuit. Each of these distributors was in active competition with the others (R. I, 193-194). Each was concerned in procuring a commitment from Interstate to exhibit in its Class A theatres

as many of its feature pictures as possible and to know what percentage of first run exhibition receipts would be paid to it as licensee. Until these fundamental terms could be agreed upon there could be no agreement with respect to the proposed restrictions with Interstate, much less with all the other distributors who were equally concerned with procuring for themselves and in competition with each other exhibition in Interstate's Class A theatres upon the most favorable terms.

The terms of the license agreements, which included the question of how many pictures should be exhibited in Interstate's Class A theatres, the percentage rental for those pictures and the proposed restrictions upon their subsequent exhibition, were the subject of separate negotiations between each distributor and Interstate Circuit. As a result of these negotiations, Interstate separately consummated contracts with each of them for the exhibition of their pictures during the 1934-1935 season. No one was present at any negotiations with any distributor except Hoblitzelle and O'Donnell, representing Interstate Circuit, the branch manager of the distributor involved, and a superior sales official from outside the state (R. I, 167, 175-181). In none of the separate negotiations did O'Donnell condition agreement with the distributor involved upon the action of the other distributors or any of them (R. I, 182). To the contrary the negotiations clearly reflect the independence of the action taken by each distributor.

The first negotiations were commenced with Paramount, with which Interstate Circuit was affiliated, shortly after the letter of April 25th was sent out (R. I, 175). Dugger, Paramount's branch manager, expressed approval. Thereafter O'Donnell and Hoblitzelle discussed the restrictions with George Schaeffer, President of Paramount, during a Paramount convention in Los Angeles, no representative of any other distributor being present at the discussion

(R. I, 175).* In June, Unger, Southern Division Manager of Paramount, came to Dallas and, after two or three days' discussion, he too was convinced that the proposal was for the best interests of his company. He then and there agreed on behalf of Paramount to accede to Interstate's request (R. I, 175).

Vitagraph (R. I, 176-177) was the next distributor with whom Hoblitzelle and O'Donnell negotiated. This company already had a definite rule against double featuring and a 20¢ minimum price restriction for subsequent runs of its "A" pictures (R. I, 201-202). Interstate, after discussion of the terms of the license agreement, including the restrictions, had no difficulty in persuading Vitagraph to consent to its proposal (R. I, 177). The negotiations were conducted for the company by Jacks, District Manager, and Lesserman, Assistant to the General Sales Manager (*id.*).

Metro (R. I, 177-178) was represented in its negotiations by Bickle, its branch manager, Connors, Eastern and Southern Sales Manager, and Kessnich, Southern Sales Manager. Metro had already adopted provisions in its license agreements for previous seasons restricting double featuring. After a meeting of one or two days, Metro received from Interstate a commitment of a certain number of pictures to be exhibited in Interstate's Class A theatres and agreed to impose the price restriction for three years and to make this agreement part of its three-year written contract with Interstate. No contract to impose any restrictions for more than one year was made by any other distributor.

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* The statement of the District Court in its Finding 23 (R. II, 57) that Hoblitzelle and O'Donnell were "in California during meetings of at least some of the defendant distributor executives, and there then followed the demand letter of July, 1934" is entirely misleading. The only testimony in the record is that Hoblitzelle and O'Donnell discussed the restrictions in Los Angeles with Schaeffer alone.

The negotiations of Interstate Circuit with Twentieth Century (R. I, 178-179) extended from July to October. Twentieth Century was represented by Hilgers, its Texas agent, and Ballance, its Southern representative. At each meeting Hoblitzelle and O'Donnell stressed the need for the restrictions if the increased rentals demanded by Twentieth Century were to be paid. Finally, after Ballance had discussed Interstate's proposal many times with his New York office, a one-year deal was concluded, including an agreement to impose the restrictions.

Universal (R. I, 179), represented by Oldsmith, its branch manager, and Graham, its Southern Sales Manager, refused to impose the restrictions unless Interstate would agree to play more Universal pictures in its Class A houses at top admission prices. The negotiations, lasting from July to November, were eventually consummated in a deal whereby Interstate agreed verbally that if Universal produced more fine pictures they would be shown in Class A theatres and Universal agreed that its pictures so shown should become subject to the price and double feature restrictions.

Columbia's concern was the same as that of Universal (R. I, 181). Moscow, the Southern representative, who negotiated the deal together with Underwood, the branch manager, told O'Donnell that the restrictions might be detrimental to Columbia unless more of its pictures could be shown in Interstate's "A" theatres. O'Donnell declined to increase Interstate's commitment in advance, but verbally agreed to show more of Columbia's pictures in Class A theatres if more fine pictures were produced and this distributor thereupon agreed to the restrictions.

The next negotiations were between Interstate Circuit and United Artists, represented by Roberts, its Branch Manager, and Gold, its Southern Sales Manager (R. I, 180). From the inception of its business United Artists had pursued in its own interest the policy of producing a few highly specialized and very fine pictures each year which

it declined to license for exhibition except upon agreement by the exhibitor that its pictures would not be shown for an admission price of less than 25¢ or as part of a double bill (R. I, 180, 213). This company licensed each of its pictures for exhibition individually upon the best terms it could negotiate (R. I, 180). In the negotiations between Interstate and United Artists, Gold stated that this had always been his company's policy and that what Interstate was proposing met that policy exactly. Naturally he subscribed to the 25¢ minimum price and the elimination of double features (R. I, 180).

The negotiations with RKO (R. I, 180) were protracted. This distributor refused to commit itself on the proposed restrictions until other terms were agreed upon, particularly the amount of rentals to be paid for its pictures, which necessarily included the number of its pictures to be exhibited in Class A theatres. The parties could not agree until late in October, when a verbal understanding was reached on the price restriction alone. RKO had already established a definite policy in its own interest against double features (R. I, 76).

The testimony of Hoblitzelle (R. I, 167)—characterized by the trial court as one of the finest characters in the City of Dallas (R. I, 240)—and of O'Donnell (R. I, 175-182), representing Interstate, and of Oldsmith (R. I, 153), Dugger (R. I, 198), Jacks (R. I, 201), Roberts (R. I, 213) and Underwood (R. I, 217), representing distributor defendants, establishes the fact that in these negotiations the distributors acted independently of one another and that there was no communication or concerted action between any of them.

The agreements made by the distributor defendants with Interstate for the 1934-1935 season which resulted from these negotiations were by no means uniform and there was no similarity of form or of expression from which an agreement among the distributors might be inferred. Four of the distributors (Metro, Vitagraph, RKO

and United Artists) already had a definite policy against double featuring and United Artists, in addition, had a fixed sales policy of a minimum 25¢ admission price. The court below gave partial recognition to this situation by limiting relief against Metro and Vitagraph to an injunction against enforcing the price restriction but failed so to limit the injunction against RKO and United Artists. Metro's agreement to impose the price restriction upon subsequent run exhibitors was included in its written license contract with Interstate (R. I, 67); the agreements made by the other distributors, as outlined above, were verbal and were not embodied in the written license agreements later executed by each of these distributors with Interstate (A. S. par. 12, R. I, 65-78). Paramount and Twentieth Century, however, inserted in their written license contracts with Interstate a provision imposing both of the restrictions upon Interstate itself, as subsequent run exhibitor (R. I, 65, 68). Metro's agreement was for a period of three years, whereas the agreements with the other distributors were only for a single season. Metro's agreement applied only to Dallas, Fort Worth and San Antonio, while Paramount's agreement covered Houston and Galveston as well, and Twentieth Century's and Universal's agreements broadly covered all six cities (A. S. par. 12, R. I, 65-78).

Similar diversity characterizes the 1935-1936 and 1936-1937 agreements with Interstate. Provision for the 25¢ price restriction appeared in the written license agreements of Twentieth Century, Universal, Paramount and United Artists with Interstate Circuit; no such provision was contained in the written license agreements of RKO, Vitagraph and Columbia (A. S. par. 12, R. I, 65-78). The 1935-1936 contract of Universal covered five of the six cities in which Interstate Circuit operated; a memorandum of agreement between Twentieth Century and Interstate Circuit for the same season covered all six cities (A. S. par. 12, R. I, 65). The Paramount agreement for that season related only to Dallas, Fort Worth, Houston and

San Antonio (A. S. par. 12, R. I, 69), while the terms of the United Artists agreement broadly covered all six cities (A. S. par. 12, R. I, 74; see p. 56, *infra*).

The agreed statement of facts shows the provisions of the subsequent run license agreements of the respective distributors.* These provisions are worded so differently that they could not give any support to an inference of agreement among the distributors to impose the restrictions because of similarity of language or phraseology (*cf.* Finding 17, R. II, 55).

Twentieth Century's contract provided (R. I, 65):

> "Exhibitor agrees as to any feature picture shown first run at a night adult admission price of 40¢ or more on the lower floor, not to show such picture subsequent run at less than 25¢ night adult admission price on the lower floor, nor as a part of a double feature program."

Columbia's contract provided (R. I, 70):

> "Any feature receiving first run downtown, general night admission of 40¢ or more, not to be exhibited for less than 25¢, general night admission, and is not available for double program exhibition. In the event the exhibitor is unable to charge 25¢ for features receiving 40¢ general admission first run downtown, he has the privilege of eliminating these pictures from this contract, provided the theatre does not exhibit any other product at an admission price of 25¢."

RKO's restriction against double featuring was (R. I, 76):

> "The exhibitor agrees that none of the feature photoplays licensed hereunder will be exhibited at the same performance with any other feature photoplay as a part of a double feature program, and a breach of this provision will be considered a material breach of this agreement."

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* Twentieth Century, R. I, 65; Metro, R. I, 67; Paramount, R. I, 68; Columbia, R. I, 70; Universal, R. I, 72; United Artists, R. I, 74; RKO, R. I, 76; Vitagraph, R. I, 76.

Two of the distributors, acting solely in their own interests and not in pursuance of any conspiracy with any other distributor, imposed the price and double feature restrictions upon Interstate itself as a subsequent run licensee in Houston of features shown first run by Loew's Houston Company, a subsidiary of Metro and a first run competitor of Interstate. Metro protected the first run exhibition of its pictures by Loew's Houston Company for the seasons 1934-1935 and 1935-1936 by an exclusive license to that Company, and for the season 1936-1937, by including in Interstate's subsequent run license agreement for Houston the 25¢ price restriction and the restriction against double featuring (A. S. par. 12, R. I, 67). For the seasons 1934-1935 and 1935-1936 United Artists, in the exercise of its independent business judgment, licensed 12 of its fine, specialized pictures to Interstate's competitor at Houston and protected the first run exhibition of those pictures by including in Interstate's subsequent run license for such pictures the 25¢ price restriction and the restriction against double featuring (A. S. par. 12, R. I, 74-75). Interstate complied with the restrictions imposed in Houston by Metro and United Artists and exhibited in its subsequent run theatres 42 Metro pictures and 12 United Artists pictures (*id.*).

None of the distributor defendants granted the request made on behalf of Texas Consolidated in O'Donnell's letter of July 11th that pictures exhibited in its Class A theatres in the Rio Grande Valley at 35¢ should be restricted to subsequent runs in the Valley at 25¢ (A. S. par. 12, R. I, 65-78). Paramount, which was affiliated with Texas Consolidated, did agree to and did impose for the single season 1934-1935 a 25¢ price and a double feature restriction upon pictures shown first run by Texas Consolidated at a 40¢ admission price in the Cities of Albuquerque, New Mexico, El Paso, Tyler, Amarillo, Waco and Wichita Falls, Texas, none of these cities, however, being in the Rio Grande Valley (R. I, 68-69). No demands were made upon any of the distributor defendants on

behalf of Texas Consolidated for any restrictions whatever for the 1935-1936 and 1936-1937 seasons (R. II, 55) and no such restrictions were in force when the action was commenced or at the time of trial in any part of the territory in which Texas Consolidated operates theatres as a result of any demand or request on the part of Texas Consolidated (R. I, 78).

The District Court found that the restrictions proved to be advantageous to each of the distributor defendants, and likewise advantageous to Interstate's first run business (Finding 26, R. II, 58). Their effect was therefore to protect the reward of the copyright and the value of the granted right of first run exhibition.

This protection, however, was not at the cost of the subsequent run houses. During the time that the restrictions were in force, Interstate Circuit exhibited all Class A pictures in its subsequent run theatres at an admission price of 25¢ and each of its subsequent run theatres operated at an increased profit (R. I, 190-191). During this time, the number of subsequent run competing theatres in the four cities increased and no subsequent run theatre retired from business (R. I, 174, 118).

It may be that attendance was deflected from subsequent run theatres to Interstate's first run theatres, but there was nothing to show that the income of subsequent run exhibitors was thereby reduced except in a few poorly equipped and ill furnished theatres.* The fact is that if a theatre which previously charged a 15¢ admission price raised its admission price to 25¢, the attendance would have to decrease by more than 40% before its gross income would be adversely affected. The uncontradicted testimony shows that well equipped subsequent

* There were 49 subsequent run theatres competing with Interstate in the four key cities. Twenty subsequent run exhibitors in these cities testified and a large majority of their theatres operated at a profit (R. I, 118, 121, 134, 140, 142, 150, 198, 204, 207, 208, 211).

run competing theatres, suitable for exhibition of Class A pictures, operated at increased profits after the restrictions were adopted (R. I, 118, 134, 140, 142, 204, 207, 208, 211).

There were only five small theatres in the four cities which refrained from licensing Class A pictures, three in Houston, one in Fort Worth and one in Dallas (R. I, 110, 113, 121, 128, 198). Of the three theatres in Houston, two of which had no balconies, one could not persuade its patrons to pay "two bits in a 15¢ joint" (R. I, 110), another found that restricted and unrestricted pictures had about the same drawing power in that locality (R. I. 115) and the third licensed unrestricted pictures from all the distributor defendants and had a very prosperous operation for the three years immediately prior to the date of the trial (R. I, 121). The one theatre in Fort Worth which did not license Class A pictures exhibited only pictures of other distributors This theatre was located four blocks away from a much finer theatre under the same management which exhibited Class A pictures at a profit (R. I, 127). In Dallas the one theatre which refrained from licensing Class A pictures had been operating for about sixteen years charging 10¢ admission. It licensed unrestricted pictures from some of the distributor defendants and some from other distributors. It had no difficulty in procuring sufficient pictures to change its program four times a week. It continued to charge 10¢ admission and had a successful operation. The restrictions did not affect its business (R. I, 198).

In all the cities there were many subsequent run theatres having balconies where any member of the community could see all of the Class A pictures in the balcony for not more than 15¢ admission. Furthermore, these pictures could be seen in any theatre having an afternoon exhibition for not more than 15¢ matinee lower floor admission price.

The restrictions against double featuring had direct relation to price, the practice being to show two features

for the price of one. But even so, this practice was unpopular with the public because of the inordinate length of the programs and the showing of inferior pictures on the same program with good ones (R. I, 119, 170, 184, 205).*

The only effect of the price restriction upon the public was that persons unwilling or unable to pay more than 15¢ for motion picture entertainment could not, during the evening, view from an orchestra seat the most expensive product of the industry—pictures ranging up to two and one-half million dollars in cost. As against this normal condition incident to all commercial intercourse in which cost is a determining factor of price, it is agreed that unless first run exhibition is protected by the imposition of the restrictions upon subsequent run exhibition, a profitable return cannot be derived from these costly motion pictures. Under these circumstances, the requirement that persons desiring to see Class A pictures from an orchestra seat during an evening performance should pay an admission price which is commensurate with the cost of such pictures does not appear to be unreasonable.

Specification of Errors.

1. The District Court erred in concluding as a matter of law that it was a violation of the Sherman Act for an individual distributor defendant, acting independently of any other distributor, to agree with its first run exhibitor that it would include in its license agreements with subsequent run exhibitors a provision that copyrighted motion picture photoplays distributed by it, which were exhibited first run by the exhibitor in certain cities at an admission price of 40¢ or more, should not be exhibited

* One exhibitor only testified that he made more money when he double billed, but a moment before this exhibitor had testified that 1935, when both restrictions were in effect, was the banner year in his business (R. I, 150).

subsequent run in the same city for an admission price of less than 25¢ or as part of a double feature program. (Assignment of Errors 44-47, 49-52, R. II, 93-95, 110-113.)

2. The District Court erred in concluding as a matter of law that the price and double feature restrictions imposed by the distributor defendants upon subsequent run exhibitors pursuant to agreement with Interstate Circuit were not within the protection of the Copyright Act and were illegal and void restraints of interstate trade and commerce. (Assignment of Errors 42, 43, 48, 54, R. II, 93, 94, 96, 110, 111, 113.)

3. The District Court erred in inferring (Finding 22, R. II, 56) that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate and that they agreed and conspired with Interstate to impose the restrictions requested by Interstate upon all subsequent run exhibitors in Dallas, Forth Worth, Houston and San Antonio. (Assignment of Errors 28, 29, 31, 32, 53, R. II, 90, 91, 96, 107, 108, 113.)

4. The District Court erred in drawing any inference of an agreement among the distributor defendants to grant the request of Interstate (Finding 22, R. II, 56) from the facts recited in Findings 12 to 21. (Assignment of Errors 17-20, 27-29, R. II, 87-90, 104-107.)

5. The District Court erred in finding as facts those facts stated in Findings 10, 12, 13, 15, 17, 19, 20, 21, 23, 25 and 26 to which error has been assigned, and in overruling the defendants' objections to such findings of fact. (Assignment of Errors 7-9, 11, 14, 15, 19, 20, 27, 30, 33, 34, R. II, 85-91, 102-108.)

6. The District Court erred in failing and refusing to find as facts facts established by the stipulation and agreement of the parties and facts established by un-

disputed and unimpeached testimony. (Assignment of Errors 10, 12, 13, 16-18, 21-26, 31, 35, 36, R. II, 85-91, 102-109.)

7. The District Court erred in concluding as a matter of law that the distributor defendants, by acting pursuant to a common plan and understanding in imposing the restrictions, engaged in a combination and conspiracy in restraint of trade and commerce in violation of the Sherman Anti-Trust Act. (Assignment of Errors 37-41, R. II, 92-93, 109-110.)

8. The District Court erred in granting any injunctive decree. (Assignment of Errors 1-6, R. II, 83-84, 100-102.)

9. The District Court erred in granting an injunction against the making of any agreement between any distributor defendant, not acting in concert with any other distributor, and Interstate or Texas Consolidated to impose any price or double feature restriction. (Assignment of Errors 3, 5, 55, 56, R. II, 84, 96, 101-102, 111.)

Summary of Argument.

The insertion of the price and double feature restrictions in subsequent run license agreements was for the benefit of the distributor, owner of the copyrighted motion picture photoplay, and Interstate Circuit, the first run licensee. Therefore, each distributor defendant, acting independently of all of the other distributors, had the right to include either or both of the restrictions in subsequent run license agreements, pursuant to agreement for first run exhibition with Interstate Circuit. Such action is within the lawful exercise of the monopoly granted by the copyright law and is not in violation of the Sherman Act.

Regardless of any question of agreement among the distributors to grant Interstate's request, that part of the

decree enjoining all agreements with reference to subsequent run price or double feature restrictions between Interstate Circuit or Texas Consolidated and each distributor defendant, acting independently of all other distributors, must be reversed.

The findings of the court upon which it relied to support its inference that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate Circuit, and that they agreed and conspired with each other and with Interstate Circuit to impose the restrictions requested by Interstate, when read in the light of the agreed statement of facts, do not support such inference.

The so-called instances of "unanimity of action on the part of the distributor defendants, not in one respect only, but in many different respects wherein, apart from agreement, diverse action would inevitably have resulted", relied upon by the court to support its inference of agreement among the distributor defendants, were either contrary to the stipulated facts or were the inevitable result not of agreement but of impelling business reasons which constrained each distributor, acting without contractual restraint and solely in its own individual interest, to comply with Interstate Circuit's request.

There is no evidence of any communication between any distributor defendant and any other distributor defendant relative to the imposition of the restrictions. All of the testimony relevant to this issue shows that there was no agreement or conspiracy among the distributors to grant Interstate Circuit's request. This testimony is neither impeached nor contradicted. Thus, the Government having failed to introduce *prima facie* evidence of unlawful agreement, its lack of proof cannot be supplied by the absence of witnesses, and the court's inference of conspiracy is unwarranted.

In any event the injunction was unwarranted because the restrictions do not unreasonably restrain interstate trade or commerce.

ARGUMENT.

POINT I.

A licensee of the first run exhibition of a copyrighted motion picture photoplay has the legal right to obtain from the licensor thereof a covenant that the granted right of first run exhibition shall not be impaired or destroyed by a subsequent exhibition of the photoplay at an admission price of less than 25c or as part of a double feature program.

A distributor, the owner of a copyrighted motion picture photoplay, acting independently of any other distributor, has the legal right to agree with a first run exhibitor to include either or both of the restrictions here in question in subsequent run license agreements.

Entirely apart from any combination or conspiracy between the distributor defendants the court concluded as matter of law that the price and double feature provisions in the individual license agreements were not within any privileges or immunities conferred by the Copyright Law and were illegal and void restraints upon interstate trade and commerce (Conclusions of Law, 7 to 12, incl.,* R. II, 60-61). The decree which has been entered not only en-

* Each of these conclusions of law is introduced by the following statement: "Apart from the combination and conspiracy referred to in paragraphs 2 to 6 inclusive of these conclusions I reach the following conclusions regarding certain provisions of each of the various license agreements involved" (R. II, 59).

joins the performance of all agreements which have been made but goes so far as to enjoin each and every distributor defendant, whether acting singly or in concert with others, from hereafter agreeing with Interstate Circuit or Texas Consolidated that such distributor would impose upon subsequent run licensees any restrictive price or double feature provisions whatever (R. II. 78-79).

In view of this state of the record it becomes necessary to consider, at the outset, the validity of the individual license agreements, unaffected by the question of conspiracy among the distributor defendants.

A distributor defendant, owner of a copyrighted motion picture photoplay, has the statutory right:

(1) to grant to its licensee an exclusive right to exhibit a picture in any given territory and for any period of time within the term of the copyright; and

(2) to attach to its license agreement with its first run exhibitor any condition or covenant that has reasonable relation to the reward of its copyright for its protection or for the protection of the first run exhibitor.

The agreed statement of facts and the undisputed evidence show that each of the covenants as to subsequent run admission price and against double featuring has a direct and positive relation to the reward of the copyright and to the protection of the granted right of first run exhibition (R. I, 79, 163-164).

Under the Constitution, Art. I, Sec. 8, Congress has power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the *exclusive** right to their respective writings and discoveries * * *." In the exercise of this constitutional power Congress passed the Copyright Law, providing that

* Unless otherwise indicated italics used in this brief are ours.

any person complying with the law should have *the exclusive right*—

> "(a) To print, reprint, publish, copy and vend the copyrighted work;
>
> * * * * * * *
>
> "(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof, by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce or reproduce it in any manner or by any method whatsoever * * *."

A motion picture photoplay is a "work" under Section 1 of the Copyright Act, and the words "any transcription or record thereof" include motion picture films and prints which are used in exhibiting the copyrighted play. The copyright owner thus has an exclusive right not only to exhibit the copyrighted motion picture photoplay in any manner or by any method whatsoever but also the exclusive right to make the only means by which the photoplay may be exhibited. *Metro-Goldwyn-Mayer D. Corp.* v. *Bijou Theatre Co.*, 59 F. (2d) 70 (C. C. A. 1).

The principle that the proprietor of a copyright may by restrictive covenant protect the granted right of exhibition is well established. In *Manners* v. *Morosco*, 252 U. S. 317, Manners, the author of the play "Peg of My Heart," granted to Morosco an exclusive license to produce, perform and represent "the said play in the United States and Canada." Manners sought to enjoin Morosco from representing the play in motion pictures in violation of Manners' copyright. Morosco claimed his license was broad enough to include the right to represent the play by spoken drama and in motion pictures. The courts

below held that the license to Morosco included the right to present the play in motion pictures and denied the injunction. This Court, through Mr. Justice Holmes, said (p. 326):

> "The Courts below based their reasoning upon the impossibility of supposing that the author reserved the right to destroy the value of the right granted, however that right may be characterized, by retaining power to set up the same play in motion pictures a few doors off with a much smaller admission fee. We agree with the premise but not with the conclusion. The implied assumption of the contract seems to us to be that the play was to be produced only as a spoken drama * * *. As was said by Judge Hough in a similar case, 'There is implied a negative covenant on the part of the [grantor] not to use the ungranted portion of the copyright estate to the detriment, if not destruction, of the licensee's estate. Admittedly if Harper Bros. (or Klaw & Erlanger, for the matter of that) permitted photo-plays of Ben Hur to infest the country, the market for the spoken play would be greatly impaired, if not destroyed.' *Harper Bros. v. Klaw,* 232 Fed. Rep. 609, 613. The result is that the plaintiff is entitled to an injunction against the representation of the play in moving pictures, but upon the terms that the plaintiff also shall abstain from presenting or authorizing the presentation of the play in that form in Canada or the United States."

The covenant implied by this court for the protection of Morosco, the licensee, restrained Manners, the licensor, from competing or permitting any one else to compete with Morosco by exhibiting "Peg of My Heart" in motion pictures anywhere in the United States or Canada. The provisions of the contracts involved in the case at bar are express covenants on the part of the licensor not to use the ungranted portion of the copyright estate so as to authorize subsequent run exhibition at less than 25¢ and as part of a double feature program in the same city to the detriment or destruction of the licensee's estate.

Admittedly, if the distributor permitted pictures shown first run by Interstate Circuit at 40¢ or more to be subsequently exhibited in the same city at less than 25¢ or as a part of a double feature program, the value of Interstate's granted right of first run exhibition would be greatly impaired, if not destroyed (A. S. pars. 18, 19, R. I. 79; R. I, 163-164).

Restrictive provisions designed to protect the granted portion of a patent estate, like those designed to protect the granted portion of a copyright estate, have been held valid by this Court. In *Bement v. National Harrow Co.*, 186 U. S. 70, the owner of a patent granted a license to manufacture and sell patented articles, and agreed not to license any other person to manufacture and sell any of the patented articles. The license agreement also provided that the licensee should not sell the patented articles except at prices fixed by the agreement. In holding valid the first of these restrictive covenants, this Court said (p. 94):

> "There is nothing which violates the act in the agreement that plaintiff would not license any other person than the defendant to manufacture or sell any harrow of the peculiar style and construction then used or sold by the defendant. It is a proper provision for the protection of the individual *who is the licensee* * * *."

The Court likewise held valid under the Sherman Act the agreement restricting the prices at which the licensee might sell the harrows, stating (p. 92):

> "But that statute [the Sherman Act] clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor."

In *United States* v. *General Electric Company*, 272 U. S. 476, where the validity of a license to make, use and vend patented articles was under consideration, the question, as stated by Chief Justice Taft, was (p. 488):

> "Had the Electric Company, as the owner of the patents entirely controlling the manufacture, use and sale of the tungsten incandescent lamps, in its license to the Westinghouse Company, the right to impose the condition that its sales should be at prices fixed by the licensor and subject to change according to its discretion?"

The Government contended this agreement was in violation of the Sherman Anti-Trust Law. The Court held (p. 489) that the licensor "may grant a license to make, use and vend articles under the specifications of his patent for any royalty or upon any condition the performance of which is reasonably within the reward which the patentee by the grant of the patent is entitled to secure." The rule would not apply, the Court stated, where the patentee makes the patented article and sells it. Thereafter he can exercise no control over the purchaser.

Justice Taft propounded this question (p. 490):

> "If the patentee * * * licenses the selling of the articles, may he limit the selling by limiting the method of sale and the price? We think he may do so, provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly. One of the valuable elements of the exclusive right of a patentee is to acquire profit by the price at which the article is sold."

In *Carbice Corporation of America* v. *American Patents Development Corporation*, 283 U. S. 27, and *Standard Oil Co.* v. *United States*, 283 U. S. 163, this Court reaffirmed the principles declared in *Bement* v. *Harrow* and in the *General Electric Company* case, and in *General Talking Pictures Corp.* v. *Western Electric Co., Inc.*, No. 1, Oct. Term, 1938, decided November 21, 1938, it again expressly

reaffirmed the ruling in the *General Electric Company* case that a patentee may grant a license "upon any condition, the performance of which is reasonable within the reward which the patentee by grant of the patent is entitled to secure". Stating the rights of cross licensing patentees, this Court said in the *Standard Oil Company* case (p. 179):

> "By virtue of their patents they had individually the right to determine who should use their respective processes or inventions and what the royalties for such use should be."

Under these principles the agreements to impose the restrictions upon subsequent run exhibitors were clearly valid because both restrictions were admittedly designed and adapted to secure to the licensor the pecuniary reward of the copyright and to protect the licensee's granted right of first run exhibition.

The right of the owner of a patent or a copyright is to exclude all from exercising his exclusive rights and he may select his licensees at will, preferring the large or the small business units and granting his monopoly to one or more or to any number as he wishes, for such reasons as may impel his choice, which no doubt under ordinary circumstances will be dictated by his desire for profit in the form of royalties. *American Equipment Co.* v. *Tuthill*, 69 F. (2d) 406 (C. C. A. 7). In the exercise of his monopoly granted by statute he may impose any conditions reasonably adapted to the realization of the value of his monopoly, as, for instance, by fixing the price at which the licensee may sell unpatented articles manufactured under license by patented machinery (*Straight Side Basket Corporation* v. *Webster Basket Co.*, 82 F. (2d) 245 (C. C. A. 2); *Murphy* v. *Christian Press Ass'n Pub. Co.*, 38 N. Y. App. Div. 426), and by dictating the customers to whom articles may be sold by the licensee. *Becton, Dickinson & Co.* v. *Eisele & Co.*, 86 F. (2d) 267 (C. C. A. 6). He may also license the public performance of copyrighted works to some licensees on more favorable terms than to others.

Buck v. *Hillsgrove Country Club*, 17 F. Supp. 643 (D. R. I.). He is indeed a czar in his own domain, who may sell or not as he chooses, fix such prices as he pleases, sell at one price to one person and at another price to another, and is not required to give reasons or deal fairly with those seeking to share in his monopoly. *Victor Talking Mach. Co.* v. *The Fair*, 123 Fed. 424 (C. C. A. 7); *Dr. Miles Medical Co.* v. *Platt*, 142 Fed. 606 (N. D. Ill.).

Of course, the protection of the Copyright Act does not extend to unreasonable restraints of trade imposed pursuant to a combination, agreement or conspiracy between two or more copyright owners who have combined for the purpose of monopoly or restraint of trade. *Straus* v. *American Publishers' Association*, 231 U. S. 222; *Paramount Famous Corp.* v. *United States*, 282 U. S. 30. But in the absence of such prior agreement, combination or conspiracy, the owner of the copyright has an absolute monopoly within the field of his copyright.

The court below recognized that the distributor defendants as copyright owners had the right to give the exhibitor defendants an exclusive license to exhibit their copyrighted photoplays (R. I, 236), but concluded that the defendants had no right to make an agreement providing a lesser restraint upon licenses to subsequent run exhibitors, *i. e.*, an agreement to insert the price and double feature restrictions in all such licenses of the same pictures. The distinction lacks foundation both in logic and authority. If an agreement completely to exclude subsequent run exhibitors does not violate the Anti-Trust Laws, an agreement to impose a far less drastic restriction upon them can likewise involve no violation.

The specific contracts involved in the case at bar were considered by the appellate courts of Texas in *Glass* v. *Hoblitzelle*, 83 S. W. (2d) 796, a decision of the Court of Civil Appeals. In that case, Glass, a subsequent run exhibitor in Dallas, sought to enjoin Interstate Circuit and the distributor defendants from enforcing the subsequent run price restriction and the restriction against double

featuring. Denial of an injunction was affirmed after full review on the merits, the appellate court holding that the subsequent run price restriction and the restriction against double featuring had a reasonable relation to the reward of the copyright and to the value of the copyrighted motion picture photoplays and that the anti-trust laws of Texas had no application to them. The principles applied are settled law in Texas with regard to purely intrastate transactions. *Coca-Cola Company* v. *State*, 225 S. W. 791.

In *Shubert Theatre Players Company* v. *Metro-Goldwyn-Mayer Distributing Corporation*, unreported, Jan. 30, 1936 (D. Minn.), the petitioner sought to enjoin a first run exhibitor and the eight major distributors from carrying out any agreements to the effect that pictures shown first run should not thereafter be shown at an admission price of less than 15¢ and should not be subsequently shown as part of a double feature program on the ground that said agreements were in violation of the Sherman Anti-Trust Act. The Court held each of the provisions valid. We file herewith copies of this decision.

Even if the photoplays had not been copyrighted, the agreement between an individual distributor agreeing to impose the restrictions and a first run exhibitor would still be valid. The undisputed fact is that, had subsequent run licenses been granted without these restrictions, the first run business of Interstate Circuit would have been injured (R. I, 79, 164). The agreement between Interstate Circuit and each distributor defendant was intended simply to protect the distributor in the enjoyment of profits from first run exhibition and Interstate Circuit from unreasonable interference, due to subsequent action by the distributor itself, in the enjoyment of the rights for which it was contracting. The agreements therefore fall within the principle established by the decisions of this Court that a contract containing a covenant in restraint of trade is nonetheless valid if the restraint is reasonably necessary for the protection of the right granted by the contract.

Thus the right of a vendee of a going business engaged in interstate commerce to bind his vendor not to engage in that business for a period of years in a prescribed territory, if the restriction of the vendor's right to engage in such business has a reasonable relation to the value of the business sold, is established, and such agreements do not offend the Sherman Anti-Trust Law. *Cincinnati Packet Company* v. *Bay*, 200 U. S. 179; see *Oregon Steam Navigation Co.* v. *Winsor*, 20 Wall. 67; *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (C. C. A. 6); *Allison* v. *Seigle*, 79 F. (2d) 170 (App. D. C.); *A. Booth & Co.* v. *Davis*, 127 Fed. 875 (E. D. Mich.). So also, the vendor of an article to be used in a business or trade in which he is engaged may contract with the vendee that the article shall not be used so as to interfere with the vendor's business. Such a provision does not offend the Sherman Anti-Trust Law if the region in which the article is not to be used has reasonable relation to the value of the business of the vendor. See *Fowle* v. *Park*, 131 U. S. 88; *Oregon Steam Navigation Co.* v. *Winsor, supra; United States* v. *Addyston Pipe & Steel Co., supra; Moore* v. *New York Cotton Exchange*, 270 U. S. 593; *United States* v. *General Electric Company*, 272 U. S. 476; *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236, 250, 252.

In *Cincinnati Packet Company* v. *Bay, supra*, certain steamers were sold with a stipulation that for five years the seller should not engage in operating any freight and passenger packets from Cincinnati to Portsmouth, Ohio, and intermediate points. It was claimed that this covenant was an illegal restraint of trade. Mr. Justice Holmes, in declaring the covenant valid, among other things said (pp. 184-185):

> "The withdrawal of the vendors from opposition for five years is the ordinary incident of the sale of a business and good will.
>
> "* * * The price is paid not for the vessels alone but for the vessels with the covenant.

"* * * there has been no intimation from anyone, we believe, that such a contract, made as part of the sale of a business and not as a device to control commerce, would fall within the act [Sherman Anti-Trust Act]. On the contrary, it has been suggested repeatedly that such a contract is not within the letter or spirit of the statute. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 329; *United States* v. *Joint Traffic Association*, 171 U. S. 505, 568, and it was so decided in the case of a patent. *Bement* v. *National Harrow Co.*, 186 U. S. 70, 92."

Paraphrasing the language of Justice Holmes in the above case, the license fee paid by the Interstate Circuit was not for the right to exhibit the pictures, but for the right to exhibit the pictures *with the covenant* that the value of their exhibition should not be destroyed by subsequent exhibition as part of a double feature program or for less than 25¢ admission.

The protection given by the law to the copyright owner is greater than that afforded the seller and buyer in the cases cited above. In the former case the contracting parties are dealing with an existing statutory monopoly which may be exercised to its fullest extent so long as the monopoly granted by statute is not utilized (1) to impose restraints unrelated to the reward of the statutory monopoly, or (2) to monopolize trade in articles not covered by the statutory monopoly. It follows that a copyright proprietor entitled by statute to the exclusive exhibition right of a motion picture photoplay may in granting an exhibition right to another bind and restrain himself by any covenant which has reasonable relation to the reward of the copyright or the protection of the granted right even though such covenants directly restrain interstate commerce. The Sherman Anti-Trust Act has no application to such restraints, which under all the authorities are within the statutory monopoly of the copyright.

POINT II.

The decree must be reversed insofar as it enjoins separate agreements between each of the exhibitor defendants and each of the distributor defendants, not acting in concert with any other distributors, to impose restrictions necessary for the protection of their mutual interests in the copyright reward.

The trial court in its conclusions of law held that an individual contract between a distributor defendant, acting independently of any other distributor, and its first run licensee was in and of itself illegal (Conclusions of Law 7-12, R. II, 60, 61). Having reached this erroneous conclusion of law, the court issued an injunction the effect of which is to enjoin each of the distributor defendants from imposing any restrictions as to admission price or double featuring in furtherance of any agreement between it and Interstate Circuit or Texas Consolidated (Decree, par. 4, R. II, 78). Each and every one of the corporate defendants, including Texas Consolidated, was enjoined from entering into such agreements (Decree, par. 6, R. II, 79). The court did not find that there was any conspiracy or agreement among the distributor defendants to grant any restrictions requested by Texas Consolidated, but held that the single contract made by it with Paramount in 1934 was a combination and conspiracy in violation of the Sherman Anti-Trust Act, and enjoined Texas Consolidated from in the future engaging in any such combination or conspiracy (R. II, 62, 79).

We have shown (Point I, *supra*) that the individual license agreements were valid since the restrictions they contained were for the mutual protection of the interests

of the licensor and the licensee in the reward of the copyright. Conclusion necessarily follows that the decree must be reversed insofar as it enjoins such agreements between Interstate Circuit or Texas Consolidated Theatres and each distributor defendant, acting independently of all other distributors.

POINT III.

The court's inference in Finding 22 that the distributor defendants agreed and conspired among themselves to take uniform action on the proposals made by Interstate Circuit, and that they agreed and conspired with each other to impose the restrictions requested by Interstate, is unsupported by the preceding Findings 12 to 21 upon which it is expressly predicated, and is contrary to the stipulated facts and the undisputed evidence.

In such a case as this, where parties engaged in normal business transactions and activated by similar motives of business interest are charged with illegal conspiracy and agreement predicated upon uniformity of action, it must constantly be borne in mind that the transactions engaged in are not in themselves illegal and that in order to make out unlawful conspiracy something more than mere uniformity of action must be shown. *Frey & Son* v. *Cudahy Packing Co.*, 256 U. S. 208. To warrant the injunction invalidating such transactions, there must be a "definite factual showing of illegality", *i. e.*, a clear purpose to monopolize or restrain trade. *Standard Oil Co.* v. *U. S.*, 283 U. S. 163, 179. Far from being symptoms of a larger combination the license agreements were but the exercise of lawful and exclusive exhibition rights

granted by statute to the proprietors of copyrighted motion picture photoplays. From the plurality and similarity of such lawful acts unlawful combination may not be inferred. *Terminal Warehouse* v. *Penn. R. Co.*, 297 U. S. 500, 516.

The agreements between individual distributor defendants and Interstate Circuit, lawful in themselves, were not shown to have been, as the Government alleged, part of a plan to monopolize or an attempt to monopolize. The court did not find any such unlawful purpose and the evidence shows there was no such purpose. The sole purpose and effect of the requested restrictions was to protect the exclusive exhibition rights granted by statute.

The court below predicated a finding of conspiracy solely upon an inference based upon its findings of fact numbered 12 to 21, inclusive, stating:

> "From the facts set forth in findings 12 to 21, inclusive, and particularly from the unanimity of action on the part of the distributor defendants, not in one respect only, but in many different respects wherein, apart from agreement, diverse action would inevitably have resulted, I find" etc. (R. II, 56).

Analysis of the findings in paragraphs 12 to 21 shows that there was no finding of any facts from which it can be inferred that there was unlawful agreement among the distributors to accept the proposals of Interstate or that diverse action would have been taken by them in the absence of an agreement between them to accept such proposals.

The findings in paragraphs 12 to 21, inclusive, may be summarized as follows:

12. O'Donnell's letter of July 11, 1934, was addressed to the distributors jointly. It "included a demand that any feature picture exhibited in a Texas Consolidated first run theatre located in the Rio Grande Valley at an admission price of 35¢ or more should not thereafter be exhibited in the same city at an admission price of less than 25¢" (R. II, 52-53).

13 and 14. The price restriction was an important departure from previous practice and the restriction upon double billing was a novel and important departure from prior practice. (R. II, 53-54.)

15. Three of the branch managers representing distributor defendants expressed in correspondence with their home offices hostility to or criticism of the proposed restrictions. No correspondence was found in the files of four others, and in one case the correspondence was not introduced. (R. II, 54.)

16. During the course of negotiations which occurred at various times during the summer of 1934 between Hoblitzelle and O'Donnell, representing Interstate, and representatives of each distributor defendant, all of the distributor defendants agreed with Interstate to impose both of the requested restrictions upon subsequent run exhibitors. Interstate's request covered pictures exhibited first run at an admission price of 40¢ or more. There were five cities where such pictures were exhibited and where there were competing subsequent run theatres. The distributor defendants with substantial unanimity agreed to impose, and did impose, the restrictions in only four of the cities,—excepting, however, Metro and (in 1934-1935) Universal. (R. II, 54.)

17. The provisions imposing the restrictions in various subsequent run license contracts varied slightly in language or phraseology but the substance of the restrictions imposed by each distributor was the same. (R. II, 55.)

18. None of the distributors except Paramount, and it only for the 1934-1935 season, imposed any restriction as to admission prices in cities, either in the Rio Grande Valley or elsewhere, in which Texas Consolidated operates its theatres. There is no evidence that prior to or during the

negotiations Hoblitzelle or O'Donnell withdrew the demand for a price restriction in the Valley which was made on behalf of Texas Consolidated in the letter of July 11, 1934. No demands were made on behalf of defendant Texas Consolidated for the imposition of restrictions for the seasons 1935-1936 and 1936-1937 (R. II, 55).

19. When the independent exhibitors heard of the restrictions proposed by Interstate Circuit they strongly opposed them. (R. II, 55.)

20. Either of the two proposed restrictions could have been put into effect by any one or more of the distributor defendants without putting the other into effect. Adoption of the restrictions by all of the distributor defendants alike was financially beneficial to each, but in the absence of substantially unanimous action the adoption of either or of both by one or more would have caused a loss of the business of subsequent run exhibitors unwilling to conform to the restrictions and of the customer good-will of independent exhibitors generally. The more nearly unanimous the action of the distributor defendants in imposing the restrictions, the greater the benefit that would be derived by Interstate. (R. II, 56.)

21. The distributor defendants did not call as witnesses the superior officials from outside the State of Texas who negotiated the 1934-1935 contracts with Interstate. The most important issue in the case was whether the distributor defendants in agreeing with Interstate to impose the restrictions acted pursuant to an agreement or understanding among themselves, and facts material to this issue were within the peculiar knowledge of these superior officials. (R. II, 56.)

As heretofore stated, the case was tried upon an agreed statement of facts and it was stipulated by the parties

that additional evidence bearing upon the issues might be introduced but not if inconsistent with any fact contained in the agreed statement (R. I, 48). The facts thus stipulated must accordingly be taken as true (*Hackfeld & Co.* v. *U. S.*, 197 U. S. 442) and findings of the court inconsistent with the facts thus established by the agreement of the parties must be rejected. *Kings County Lighting Co.* v. *Nixon*, 268 Fed. 143, 149, aff'd, 258 U. S. 180. Furthermore, if one would infer illegal conspiracy from similarity of lawful acts there must be accuracy in statement of the facts upon which the inference is predicated, and if the inference is inconsistent with any of the facts established by agreement of the parties it must be rejected.

Inaccuracy of statement, fundamental misconception of the stipulated facts and a failure to regard facts established by the stipulation of the parties are apparent in the court's Findings 12 to 21.

The court's findings with respect to the nature of the proposal made by Interstate reveals such fundamental misconception of the stipulated facts. The court treats Interstate's letter of July 11th as addressed to the distributors jointly and as though inviting joint action. The stipulated facts show that it was addressed to each of the representatives of each distributor, naming them (R. I, 63), and that it invited individual decision by each distributor (R. I, 64). The letter states (*id.*):

> "In the event that *a* distributor sees fit to sell *his* product to subsequent runs in violation of this request, it definitely means that we cannot negotiate for *his* product to be exhibited in our 'A' theatres at top admission prices."

The court further misconceived the nature of Interstate's proposal in its statement in Finding 20 that "either of the two proposed restrictions could have been put into effect by any one or more of the distributor

defendants without putting the other into effect" (R. II, 56). O'Donnell's letter of July 11th contained Interstate Circuit's complete proposal. This letter referred to the price restriction in the letter of April 25th and then made one proposal including both restrictions. Immediately following this proposal, the letter in the above quoted paragraph advised each distributor that unless it granted this proposal including both restrictions, Interstate Circuit could not negotiate for its pictures to be exhibited in Interstate's Class A theatres at top admission prices. Of course, if a distributor wished to abandon exhibition in Interstate's Class A theatres, it could have imposed one of the restrictions without the other, but it could not comply with Interstate Circuit's proposal without agreeing to include both restrictions in its subsequent run licenses for the 1934-1935 season.

The proposal in the letter of July 11th thus presented each distributor with the alternative of imposing both restrictions, each of which the agreed statement of facts shows was to its advantage, and having its pictures shown in Interstate's Class A houses, or refusing to impose the restrictions and having its pictures shown in Interstate's second class first run houses. No distributor could possibly have afforded to suffer the loss resulting from refusal to comply with the request—a loss which, as stated above, would have amounted to a minimum of $1,100 per picture in Dallas alone and many times that amount for the four cities involved (see p. 16, *supra*).

The court chose to ignore these obvious financial considerations which constrained the individual choice of each distributor. It made no mention whatever of the agreed fact that a refusal of either restriction would have reduced the total of all license fees received by the noncomplying distributor for each picture which would otherwise have been shown in Class A theatres (see p. 17, *supra*). Its only finding concerning the business aspects

of the situation facing the distributors was the following statement in Finding 20 (R. II, 56):

> "Adoption of the restrictions by all distributor defendants alike was financially beneficial to each, but in the absence of substantially unanimous action by them with respect to the restrictions, adoption of either one of the restrictions or of both by one or more individual distributor defendants would have caused such distributor defendants to lose the business of subsequent run exhibitors who were unwilling to conform to the restrictions and would have caused them to suffer a serious loss of the customer good-will of independent exhibitors generally."

The court did not find that, in the absence of substantially unanimous action, adoption of the restrictions by one or more of the distributor defendants would have been disadvantageous to them. It found only that in the absence of substantially unanimous action adoption of the restrictions by one or more of the distributor defendants would have caused them to lose the business of subsequent run exhibitors unwilling to conform to the restrictions and to suffer a serious loss of the customer goodwill of independent exhibitors generally. The significant fact, which the court ignored, is that any such hypothetical loss was utterly insignificant in comparison with the far more serious and demonstrable loss which the stipulated facts show each distributor would have suffered if it had declined to comply with the request (see pp. 16-17, *supra*).

In considering the request, each individual distributor knew that refusal, on the one hand, meant a tremendous and certain loss of first run revenue, with a possible small increase in the business of independent subsequent exhibitors unwilling to conform to the restrictions, and that compliance, on the other hand, meant inevitable increase in first run revenue with a possible loss of some independent subsequent run business. Confronted with this choice, no possible loss of subsequent run business—the

only factor mentioned by the court—could have been considered of importance. This was true regardless of the action which any other distributor might take. Consequently, the court's finding that the absence of substantially unanimous action might have caused a loss to a complying distributor of some subsequent run business is of no probative force as indicating agreement among the distributors to take unanimous action.

Apart from what the distributor defendants *did not do*—*i. e.,* their failure to grant the request of Texas Consolidated Theatres and to impose the restrictions in Austin—the case reduces itself to the simple fact that the most valuable customer of each distributor requested each of them to take similar action, that accession to this request, even if it should arouse hostility among some independent subsequent run exhibitors, was to the independent advantage of each distributor regardless of the action taken by the other distributors, and that each distributor therefore did accede to the request as made. No inference of conspiracy can be predicated upon these facts.

Nor can any inference of conspiracy be predicated upon the fact that the distributor defendants did not agree to impose and did not impose the price restriction requested by Texas Consolidated, quoted in full in O'Donnell's letter of July 11th as follows (R. I, 64):

> "Right at this time the writer wishes to call your attention to the Rio Grande Valley situation. We must insist that all pictures exhibited in our 'A' theatres at a maximum night admission price of 35¢ must also be restricted to subsequent runs in the Valley at 25¢. Regardless of the number of days which may intervene, we feel that in exploiting and selling the distributors' product, that subsequent runs should be restricted to at least a 25¢ admission scale."

Texas Consolidated operated theatres in the Rio Grande Valley, Interstate Circuit did not.

The court in its finding of fact No. 12 (R. II, 53) misstated this request by finding that O'Donnell's letter

> "* * * included a demand that *any feature* picture exhibited in a Texas Consolidated first run theatre located in the Rio Grande Valley at an admission price of 35¢ *or more* should not thereafter be exhibited *in the same city* at an admission price of less than 25¢."

Comparison of the court's finding with the actual request quoted above shows that the words italicized do not appear in the request as written. The words "any feature picture" were substituted for "all pictures," the words "or more" were added by the court's finding, and the words "in the same city" were substituted for the words "in the Valley". These changes appearing in the court's finding distort the meaning and effect of the request of Texas Consolidated. Whether inadvertent or not, the effect of this misstatement is to indicate that the request of Texas Consolidated was similar to the request of Interstate Circuit, and thus to furnish an apparent but fictitious basis for the court's inference in Finding No. 22 that the distributor defendants agreed among themselves to grant Interstate's request because they declined the similar request of Texas Consolidated.

In considering the Texas Consolidated situation, it is important to note the exact nature of the restriction actually requested. It was not, as was the request of Interstate Circuit, that any picture shown first run *at 40¢ or more* should not be subsequently shown *in the same city* at less than 25¢ or as part of a double feature program. It was that any picture shown in the Rio Grande Valley *at 35¢* must be restricted to subsequent runs *in the Valley* at 25¢.

The Valley is a well defined section of Texas extending 150 miles or more along the Rio Grande River from Brownsville inland. It embraces a number of counties in which, however, there are no cities comparable in size with

Dallas, Fort Worth, Houston and San Antonio. The population of these cities ranges from 163,000 to 292,000.* The cities in the Valley in which Texas Consolidated operates theatres, and the population of each as shown by the census of 1930, are as follows: Brownsville, 22,000; Harlingen, 12,000; San Benito, 10,700; McAllen, 9,000; Mercedes, 6,600; Weslaco, 5,000. None of the large cities in which Texas Consolidated operates is located in the Valley.

In operation, the effect of the restriction requested by Texas Consolidated would have been that a picture shown by it first run at Brownsville at an admission price of 35¢ could not thereafter be shown at McAllen, almost 100 miles away, at less than 25¢, and the effect would have been similar as between any two towns in the Valley. None of the distributor defendants granted this request or made any such agreement under similar circumstances anywhere.

There are no facts stipulated or any evidence to show that it was to the financial interest of any distributor to grant the request of Texas Consolidated. The agreed statement of facts and the undisputed evidence shows that it was to the financial interest of each distributor to grant the request of Interstate Circuit (see pp. 16-17, *supra*). Competition of cheap subsequent run exhibition with first run exhibition in the same city at 40¢ or more cannot be compared with competition between subsequent and first run exhibition at 35¢ in theatres located in rural communities many miles apart. There is no evidence of the disparity between the rental received for first run exhibition and that received from subsequent run exhibition in the small cities located in the Valley, and therefore the record affords no basis of judgment as to the benefit or detriment in such restrictions. The Government asked no questions of any witness concerning the situation in the Valley and the failure of the distributors to impose the restrictions there

* See note, page 57, *infra*.

was not made an issue at the trial of this case by counsel for the Government.

The impression conveyed by the District Court's Finding of Fact No. 18 (R. II, 55) that "There is no evidence that, prior to or during the negotiations with the distributor defendants, defendants Hoblitzelle and O'Donnell withdrew the demand for a price restriction in the Valley which was made on behalf of Texas Consolidated in the letter of July 11, 1934" is misleading. The fact is that there is no evidence about that "demand" at all—no evidence that it was either pressed, withdrawn, or, indeed, even mentioned again. O'Donnell testified fully about the negotiations he conducted with the distributor defendants and in his entire testimony there is no mention of Texas Consolidated's request for restrictions in the Valley. The same is true of the testimony of five branch managers of the distributor defendants who testified to the negotiations in which they participated. In view of the Government's failure to prove that the request was insisted upon and of its failure to introduce any evidence whatever about the Rio Grande Valley situation, no inference of conspiracy based on that situation can possibly be justified.

The District Court's statement in Finding 18 that "None of the distributor defendants except Paramount, and it only for the 1934-1935 season, imposed any restriction as to the admission price upon subsequent run exhibitors in cities, either in the Rio Grande Valley or elsewhere, in which Texas Consolidated operates its theatres" may convey the misleading impression that Paramount, which was affiliated with Texas Consolidated, acceded to its request. The agreed statement of facts shows that Paramount did not agree to and did not impose any restrictions in the Valley whatever; it did agree to and did impose a 25¢ admission price and double feature restriction upon subsequent exhibition in the same city of pictures shown first run by Texas Consolidated at a 40¢ admission price in the cities of Albuquerque, New Mexico,

El Paso, Tyler, Amarillo, Waco and Wichita Falls, Texas (R. I, 68). None of these cities is in the Rio Grande Valley. None of the restrictions imposed related to the subsequent run exhibition of a picture shown first run for a 35¢ admission price. Thus Paramount, which was affiliated with Texas Consolidated, did not accede to the request of its affiliate for restrictions in the Rio Grande Valley, a clear indication either that the request was withdrawn or that Paramount believed the proposal was contrary to its best interests.

If any inference is to be drawn from the fact that all the distributors refused the request of Texas Consolidated, it is the inference that each distributor refused the request because it was not to its interest to grant it rather than an inference of an unlawful agreement among the distributors to grant another and different request.

Equally unjustifiable was the court's action in predicating its inference of conspiracy upon the situation in Austin. The statements in Finding 16 (R. II, 54) concerning Austin are contrary to the agreed statement of facts, and when read in the light of the facts established by stipulation of the parties give no support to the court's conclusion of conspiracy. Finding 16 reads as follows:

> "Interstate's request had covered feature pictures exhibited at any first run theatre operated by it which charged an admission price of 40¢ or more, and there were five cities, Austin, Dallas, Fort Worth, Houston and San Antonio, where Interstate operated such theatres and where there were competing subsequent run theatres. The various distributor defendants, with substantial unanimity, agreed to impose and did impose these restrictions *only* in four of these cities, Dallas, Fort Worth, Houston and San Antonio. Since Metro did not grant licenses to any subsequent run exhibitor in Houston, where an affiliate of Metro operated a first run theatre, it did not agree to impose the restrictions in Houston. Universal imposed restrictions on subsequent run the-

> atres in Austin in the 1934-1935 season, but in the two following seasons, it, like all the other distributor defendants, imposed restrictions only in the four cities previously mentioned. Interstate agreed to accept and subsequently observed both of the restrictions as to its own subsequent run theatres in Dallas, Fort Worth, Houston and San Antonio."

The agreed statement of facts shows that there was diversity of action among the distributors in reference to the imposition of the restrictions in Austin.

The printed license agreements of Metro, Vitagraph and RKO, wherever used, including Austin, during each of the three seasons beginning 1934-1935, contained restrictions against double featuring (A. S. par. 12, R. I, 68, 76-77).

The agreed statement of facts also shows that Universal, for the season 1934-1935, included both restrictions in its subsequent run agreements in Austin, and that for the season 1935-1936 it agreed with Interstate Circuit that both restrictions should be enforced in Austin (A. S. par. 12, R. I, 72-73).

During the first season, 1934-1935, Twentieth Century imposed the restrictions on Interstate as subsequent run exhibitor without limitation to the four cities. The agreed statement of facts shows that both restrictions were included by this distributor in all subsequent run licenses in the four large cities; it does not show that they were not imposed in Austin upon independent subsequent run licensees (A. S. par. 12, R. I, 65). However, this distributor, on September 6, 1935, executed a written memorandum of agreement with Interstate setting forth the basis of its exhibition contract for the following season. The same restrictions were to be imposed upon Interstate and the mutual obligation of the distributor to impose these restrictions upon other subsequent run licensees in Austin was expressed (*id.*). The agreed statement of facts as with respect to the prior season does not show that these restrictions thus agreed to be imposed were not

imposed in Austin. If there is any inference to be drawn from the stipulated facts, it is that they were imposed by this distributor there.

The agreed statement of facts shows that United Artists included both restrictions in its subsequent run license agreements for the season of 1934-1935 in the four cities. As in other cases it does not expressly state whether the restrictions were or were not inserted in license agreements covering exhibition in Austin (A. S. par. 12, R. I, 73-74), but it is established by the undisputed evidence that United Artists had never permitted double featuring of any of its pictures, in Austin or elsewhere, and that it had a fixed 25¢ minimum admission price for subsequent run exhibition (R. I, 180, 213). For the season of 1935-1936 this distributor agreed with Interstate that any of its pictures, wherever shown at a night adult admission price of 40¢ or more, would not be permitted to be shown subsequent run in the same town at less than 25¢, nor double featured (R. I, 73-74). This agreement included Austin since the agreed statement of facts shows that Interstate exhibited pictures first run in Austin at an admission price of 40¢ or more (R. I, 58).

As indicated above, RKO included in its license agreements for 1934-1935 a restriction against double featuring in all cities, including Austin. The agreed statement of facts shows that in addition to this restriction against double featuring RKO included the price restriction in the cities of Dallas, Fort Worth, Houston and San Antonio (R. I, 75). It does not show what price restrictions were imposed by RKO in any other cities.

The agreed statement of facts shows that Vitagraph "in licensing its pictures for subsequent runs in the cities of Dallas, Fort Worth, Houston and San Antonio" included the price restrictions, and that the double feature restriction was in all its license contracts (R. I, 76-77). The agreed statement of facts does not show what this distributor did as to the price restriction "in licensing

its pictures" for subsequent run exhibition in Austin, but does show, as indicated above, that Vitagraph included in its license agreements in all cities, including Austin, for 1934-1935 a restriction against double featuring.

It is entirely clear from these references to the agreed statement of facts that there was no substantial unanimity of action upon the part of the distributor defendants with reference to restrictions in Austin. The action was diverse in many respects; it not only fails to support the inference of conspiracy but is evidence that there was no agreement among the distributors to take uniform action upon the proposals made by Interstate.

In considering the foregoing references to the agreed statement of facts this Court should be mindful of the situation presented upon the trial of this case. The Government directed its attack against conditions existing in Dallas, Fort Worth, Houston and San Antonio.* All of the Government's witnesses were called to testify as to conditions existing in these cities. No witness was called from Austin, and no witness who was called testified regarding conditions there. There were only three subsequent run competing theatres in Austin and it was not shown that prior to the 1934-1935 season any of them charged less than 25¢ admission price or exhibited double

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* Austin, with a population of 53,000, was much smaller than any of the four other cities. There were in Austin only eight theatres, three first runs owned by Interstate, two subsequent runs owned by Interstate, one of which was the finest subsequent run theatre in the city, and three subsequent runs owned by others. Dallas, with a population of 260,000, had 32 theatres, of which 21 were unaffiliated subsequent run theatres; Houston, with a population of 292,000, had 18 theatres, of which 10 were unaffiliated subsequent run theatres; San Antonio, with a population of 230,000, had 17 theatres, of which 8 were unaffiliated subsequent run theatres; Fort Worth, with a population of 163,000, had 18 theatres, of which 11 were unaffiliated subsequent run theatres (A. S. par. 7, R. I, 53-58).

features. It does appear that Interstate's subsequent run theatres in Austin regularly charged 25¢ admission (R. I, 58).

It is apparent that the agreed statement of facts was drawn primarily to present the situation in these four cities. For example, detailed statistics were agreed upon with reference to the number of Class A features shown by the various exhibitors in the four cities. This tabulation omitted Austin entirely (R. I, 51). Exhibits were attached to the agreed statement of facts showing the names of Class A feature pictures exhibited first run by Interstate Circuit, but these exhibits refer only to pictures shown in the four cities (R. I, 52). The court itself defined Class A pictures as features shown in those cities (R. II, 51). During the trial no significance was attached to what was or was not done in Austin. The selection of witnesses and the questions which they were asked were designed solely to reveal the situation in the four key cities. The argument that any importance should be attached to the fact that the defendants did not agree to impose restrictions in Austin was first suggested by the respondent's brief upon the argument of the last appeal before this Court, which in substantial identity of language is embodied in the court's finding. To support an inference of unlawful conspiracy on the situation in Austin, as the trial court now attempts to do, is virtually to deprive the appellants of an opportunity to try the issue.

The statement in Finding 17 (R. II, 55) that the provisions imposing the restrictions in the licensing contracts made by the various distributor defendants with subsequent run exhibitors "varied slightly in language or phraseology" but that each of them was in substance the same is contrary to the agreed statement of facts in that there was no similarity in language or phraseology (p. 23, *supra*). Similarity in substance necessarily resulted from the fact that the same restrictions were de-

manded of each distributor by Interstate. It follows that this finding, when reference is had to the documents themselves, is no evidence of conspiracy.

The District Court apparently placed some reliance upon its Finding 15 (R. II, 54) that some of the branch managers of the distributor defendants expressed initial hostility to the request of Interstate, quoting single sentences and phrases from three letters written by the representatives of Universal, RKO and Metro, respectively. Only one of these letters, all of which are quoted in full in the record (R. I, 152, 155, 158), expressed hostility to the restrictions imposed, and this distributor (Universal) was primarily concerned in procuring in its negotiations with Interstate the exhibition of an increased number of its pictures in Interstate's Class A theatres. Its agreement with Interstate four months later resulted from assurances upon this question and not from agreement with any other distributor (R. I, 179). The second letter, written by the local representative of Metro, far from criticizing the restrictions, criticized Interstate as unfair in suggesting restrictions which it had flagrantly violated by "playing double features in Ft. Worth, San Antonio and plenty of other situations" (R. I, 155). Metro had theretofore licensed pictures to Interstate for subsequent run exhibition under restrictions against double billing and these restrictions had been violated by Interstate Circuit (R. I, 156). It had always been the policy of Metro to eliminate double features and the immediate reaction of its Sales Manager to O'Donnell's proposal was "The idea seems to be worthwhile" (R. I, 156). The third letter, written by the representative of RKO, criticized O'Donnell's letter but expressed no opinion on the merits of the proposal (R. I, 158-159).

We do not understand how the court finds proof of conspiracy in these letters. Indeed, they seem to us to be affirmative and convincing evidence of action by the

distributor defendants without prior agreement or concert of action.

The letter of one other local representative with reference to these restrictions was produced and handed to Government counsel (R. I, 160), who failed to introduce it in evidence. Yet the court in its Finding 15 (R. II, 54) notes the failure to introduce it in evidence in a connotation which is meaningless unless the statement of the fact is intended in some way to be taken against the defendants. Indeed, Finding 15 conveys the generally erroneous impression that the representatives of the distributors were at the outset generally hostile to the plan proposed by Interstate. The finding ignores the undisputed testimony which, taken in connection with the three letters introduced in evidence, shows that only Universal and Columbia, who desired an increase in Interstate's "A" theatre commitments for their pictures, were initially hostile to the plan (R. I, 179, 181) and that the initial reaction of the representatives of Metro (R. I, 177), Vitagraph (R. I, 201), United Artists (R. I, 180) and Paramount (R. I, 175) was favorable. There is no evidence in the record, other than their eventual agreement to the plan, as to what was the initial reaction of RKO or Fox.

The court also commented in Finding 15 upon the fact that no correspondence relating to the restrictions could be found in the files of four of the eight branch managers. This lack of correspondence was fully explained. The Government's request for the correspondence came during the trial. Each of the branch managers searched their files. Four of them found correspondence and delivered it to the Government. With respect to the four who could find no correspondence, the testimony was that there probably was none because it was the general practice of the branch managers to talk to their home offices frequently by telephone (R. I, 99, 101, 102, 218).

Only the three letters were offered by the Government. The court held each letter admissible only against the

distributor writing it (R. I, 154-158). Notwithstanding this limitation upon the proof, the Government has argued that these letters are evidence of conspiracy among all of the distributor defendants. Although the court's recital of the contents of these letters in Finding 15 is not limited, the finding itself must be read subject to the limitation under which the proof was received. It certainly would not be fair to assume that the court, having ruled as it did on the trial, without further hearing accepted the recitals of these letters as proof of conspiracy.

The only other finding upon which the court's inference of conspiracy is predicated is its Finding 21 that the distributor defendants did not call as witnesses any of their superior sales officials from Atlanta, Kansas City and New York, who, together with the local branch managers, negotiated the 1934-1935 contracts with Interstate. The court stated that "The most important issue in the case was whether the distributor defendants, in agreeing with Interstate to impose the restrictions, acted pursuant to an agreement or understanding among themselves, and facts material to this issue were within the peculiar knowledge of these superior officials" (R. II, 56).

As a matter of fact, at the close of the testimony offered by the Government the only issue in the case appeared to be whether or not the individual contracts made by each distributor with Interstate were valid. The question of conspiracy among the distributor defendants not only did not appear to be the "most important issue in the case", it did not appear to be an issue at all, since it was not comprehended by the pleadings (p. 5, *supra*), the Government had introduced no evidence tending to show a conspiracy, all the affirmative testimony in the case showed that no conspiracy ever existed, and the court itself had indicated that there was no issue of conspiracy by holding that the declarations of one of the so-called co-conspirators was not admissible against the others

(pp. 60-61, *supra*). The only purpose which could have been served by calling the superior officials from outside the State of Texas would have been to have them reiterate the story of the negotiations already twice told by O'Donnell and the local branch managers. Since the credibility of these witnesses had not been impeached and since no contradictory evidence had been offered by the Government, it seemed entirely unnecessary to call additional witnesses from distant parts of the country to testify to precisely the same thing.

The reliance of the trial court upon the failure to call these witnesses in effect establishes a rule that failure to disprove a fact not proved by the plaintiff is evidence of the unproven fact. This rule is directly contrary to the decisions of this Court which establish that the burden resting upon a plaintiff to prove his case by substantive evidence cannot be met by reliance upon failure of the defendant to call witnesses. As this Court stated in the case of *Northern Ry. Company* v. *Page*, 274 U. S. 65, 74, the failure of the defendant to call a witness cannot be "taken as substantive evidence of any fact". See also *Mammoth Oil Co.* v. *United States*, 275 U. S. 13, 52.

The foregoing analysis of each of the court's Findings 12 to 21 shows that when read in the light of the stipulated facts they lend no support whatever to the inference of conspiracy in Finding 22. The "unanimity of action * * * in many different respects wherein, apart from agreement, diverse action would inevitably have resulted" appears to be simply (1) that the distributors granted Interstate Circuit's request in the four key cities, the restrictions being, as the stipulated facts show, to the benefit of each of them, (2) that they refused the request of Texas Consolidated for a price restriction in the Rio Grande Valley which was not shown to be to their advan-

tage and which it may fairly be inferred would have been detrimental, and (3) that some of them did not agree to impose one or both of the restrictions in Austin, the reasons for such diversity of action not being shown.

The inference of unlawful agreement or conspiracy among the distributor defendants drawn by the court below is the more unjustified because it is contrary to all the testimony in this case, which is that there was no agreement among the distributor defendants. This includes the testimony of Hoblitzelle and O'Donnell, who conducted all the negotiations on behalf of Interstate, and of Oldsmith, Dugger, Jacks, Roberts and Underwood, representing distributor defendants (see p. 21, *supra*). The testimony of all these witnesses was uncontradicted and unimpeached. It is that the distributors acted independently of one another and that there was no communication or concerted action among them. The Government did not attempt to prove any communication between any distributor defendant and any other distributor defendant with respect to O'Donnell's proposal. There is, indeed, nothing in the entire record upon which an inference contrary to the testimony of the only witnesses who testified can be based. To the contrary, the entire record confirms their statements.

For example, their testimony is confirmed by the fact that Paramount agreed to impose the restrictions before O'Donnell's letter of July 11th was written (R. I, 175). Prior to that time there could have been no conspiracy among the distributor defendants to take uniform action upon the proposals of Interstate. In fact, for an appreciable time thereafter there could have been no such conspiracy even upon the theory of the court below. Letters of the distributors were offered in evidence by the Government and characterized by the court as showing hostility to the proposal by three of the distributors after the time that Paramount made its agreement (p. 59, *supra*).

The testimony of the independent action taken by the distributors is further confirmed by the fact that Metro, which agreed to impose the price restriction early in August, committed itself to this restriction for three years, although none of the other distributors agreed to impose either restriction for longer than the first year. If, as the Government has contended, no distributor would have agreed to impose the restrictions unless all the others made similar agreements, Paramount would not have made its agreement before negotiations with the other distributors had even been commenced and Metro would not have made an agreement which was to last two years longer than the duration of the agreements made by the other distributors.

In striking contrast to the action of Paramount and Metro, Columbia and Universal, after receiving the O'Donnell letter of July 11th, refused to accede to the proposal until after prolonged negotiations were successfully concluded, in October and November respectively. Each of these companies stated to Interstate four months after the Paramount agreement and three months after the Metro agreement that it would not be interested in granting the restrictions unless more of its pictures were exhibited in Class A theatres. Each of them agreed to accede to the proposal only after receiving satisfactory assurances that more of its pictures would be exhibited in Interstate's Class A theatres if it produced more fine pictures (p. 20, *supra*).

The negotiations with Twentieth Century were not completed until October. Vitagraph, on the other hand, acceded to the proposal in July, and United Artists shortly thereafter. United Artists, acting solely in its own interest and in the exercise of its independent judgment, had from the beginning of its business declined to license its pictures for subsequent run exhibition at less than 25¢ admission or as part of a double bill (R. I, 180, 213). The continuance of this practice was no evidence of conspiracy.

The nature of Interstate's proposal and the important questions which had to be resolved through negotiation between each distributor and Interstate before acceptance or rejection of the proposal were of such a nature that agreement among the distributors to take uniform action on the proposal would have been impracticable if not impossible. Inasmuch as Class A theatres could exhibit only a part of the pictures produced by all of the distributors and the amount of each distributor's license fees for the coming season depended on the number of its pictures exhibited in such theatres, each distributor was vitally concerned to know how many of its pictures would be so exhibited, and knew that each of its active competitors had the same concern. It was therefore imperative that each distributor, acting in its own interest, should agree with Interstate Circuit upon these fundamental terms before making any agreement as to the restrictions. The fact is that the consent of each distributor to Interstate Circuit's proposal was conditioned upon and coupled with a definite commitment by Interstate to exhibit a certain number of pictures in its Class A theatres. Under these conditions agreement among the eight distributors to take uniform action upon Interstate's request, inferred by the court below, could not have occurred in fact.

In *Glass* v. *Hoblitzelle, supra,* where the very conduct of the defendants upon which this suit was predicated was under review, the Texas Court of Civil Appeals found that there was no evidence of any conspiracy or agreement. Similarly, in *Shubert Theatre Players Co.* v. *Metro-Goldwyn-Mayer Distributing Co., supra,* which involved facts almost identical with those here presented, the court held that uniformity of action by the distributors in granting a price restriction and a restriction against double billing, being consistent with the conclusion that each distributor was acting independently for his own benefit, could not support a finding of unlawful concert of action. Again, in *Rolsky* v. *Fox Midwest Theatres,*

Inc., decided August 5, 1936, in an unreported opinion by Judge Otis in the United States District Court for the Western Division of the Western District of Missouri, it was held that an unlawful agreement or conspiracy of motion picture distributors could not be predicated upon the fact of a change by all of the distributors in an important provision of their contracts with a first run exhibitor in a given year, such change being beneficial to each. A copy of this decision is being filed herewith.

The fact that competitors in the exercise of their own judgment follow the prices of another competitor is no evidence of agreement among them to fix or maintain prices. *United States* v. *Int. Harvester Co.*, 274 U. S. 693, 708-709; *United States* v. *U. S. Steel Corporation*, 251 U. S. 417, 448; *Cement Mfrs. Protective Ass'n* v. *United States*, 268 U. S. 588, 606. The fact being established in this case that each distributor took action upon the proposal of its most valued customer similar to the action taken by its competitors in the exercise of its own judgment and in its own individual interest, no inference of conspiracy may be predicated upon such similarity of action. There is indeed in the entire case no proof susceptible of an inference of conspiracy. The case is not one of conflicting inferences, but even if it were judgment would necessarily go against the Government, which bears the burden of proving conspiracy. *Penna. R. Co.* v. *Chamberlain*, 288 U. S. 333, 339.

Conclusion follows that the District Court's Finding 22 that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate and that they agreed and conspired with each other to impose the restrictions requested by Interstate is without support in inference or evidence and the decree predicated thereon must as a matter of law be reversed.

POINT IV.

The restrictions in question do not unreasonably estrain trade or commerce.

The purpose of the Sherman Anti-Trust Act is to preent undue restraints of interstate commerce, to maintain s appropriate freedom in the public interest, and to fford protection from the subversive or coercive inuences of monopolistic endeavor. *Appalachian Coals, c.* v. *United States,* 288 U. S. 344, 359. Only such conacts and combinations are within the Act as by reason f intent or the inherent nature of the contemplated acts rejudice the public interest by unduly restricting comtition or unduly obstructing the course of trade. *Nash United States,* 229 U. S. 373, 376. It follows that the gality of any agreement, regulation or combination canot be determined by the simple test as to whether it estrains competition, and the true test of legality is hether the restraint imposed is such as merely reguites, and perhaps thereby promotes competition, or hether it is such as may suppress or even destroy cometition. *Chicago Board of Trade* v. *United States,* 246 . S. 231, 238.

In looking, as this Court has declared one must, to the cts peculiar to the business to which the restraint is pplied, its condition before and after the restraint was posed, the nature of the restraint and its effect, actual r probable, as well as its history, the evils which existed nd the reasons for adopting the particular remedy, it eems entirely clear upon this record that there is no oundation, in any view of the case, for the Government's ontention that there was an unreasonable restraint of terstate commerce.

The facts peculiar to the production, distribution and xhibition of motion pictures disclose the radical differnce between this business and the usual type of com-

mercial transaction involving the sale of commodities. No commodities are bought or sold. Copyrighted works are produced and licensed for exhibition under terms and agreements designed to protect the interests of the licensee and of the licensor in granted rights of exhibition. We do not dispute that interstate commerce is involved (*Binderup* v. *Pathe Exchange,* 263 U. S. 291) but in judging the restraints here in question it must always be remembered that they are related not to the sale of goods but to the grant of exclusive rights of exhibition of copyrighted motion pictures. When the restrictions were first proposed by an important exhibitor to the distributors, cheap subsequent run admission prices and double featuring were destroying the business of both. The increased costs of production of the outstanding pictures could not be met if this condition continued because of its effect upon the total license fees received for these expensive pictures. The purpose of the restraint was to deal with this concrete business problem. There was no purpose or intent to eliminate competition between the distributors or producers of such pictures. On the contrary they remained free to compete and have always been in active competition in licensing their pictures for exhibition. The restrictions simply assured to the owner of a statutory monopoly compensation commensurate with the cost of an original copyrighted creation, and to the licensee protection against unfair and ruinous competition from subsequent licensees of the same picture. The record demonstrates that such restraints did not adversely affect the interests of subsequent run exhibitors as a whole (see pp. 25-26, *supra*).

The insignificant effect of the restraints is shown in the statement of the case (pp. 25-27, *supra*). From the circumstances there recited the generalities of the court's finding as to the effect of the restrictions (R. II, 57-58) lose all significance if the solution of the very serious problem which confronted the industry is to be viewed with any sense of reality, and the tests of illegality laid down by this Court in the *Appalachian Coals* case and the *Chicago Board of Trade* case are to be applied.

Conclusion.

We respectfully submit that the decree of the Dis-
ict Court should be reversed with directions to dis-
iss the Government's petition.

Respectfully submitted,

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Thomas D. Thacher,
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ohn R. Moroney,
ichard H. Demuth,
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APPENDIX.

Section 1 of the Sherman Anti-Trust Act, 26 Stat. 209, 15 U. S. C. A. § 1, as amended August 17, 1937, 50 Stat. 693, provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title, as amended and supplemented: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 1 of the Copyright Act, 35 Stat. 1075, 17 U. S. A. § 1, provides:

"Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work; * * *

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever."